NO. 82-1994

IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

KIRBY FOREST INDUSTRIES, INC.,
Petitioner

v.

UNITED STATES OF AMERICA,
Respondent

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF OF PETITIONER

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QUESTIONS PRESENTED*

1. Whether, under the Fifth Amendment, in a "straight" condemnation of unimproved real property pursuant to 40 U.S.C. § 257, the date of taking for the purpose of calculating interest due, if any, on the award is (i) the date the landowner is effectively denied the economically viable use and enjoyment of the property or (ii) the date of payment of the award.

2. Whether, in the resolution of the existing conflict between the Fifth and Ninth Circuits on the above question, this Court for the purpose of determining when a taking occurs in a straight condemnation should adopt (i) an analysis differing from the analysis given police power cases or (ii) a general rule applicable to all straight condemnations.

3. Alternative to the first question, whether under 16 U.S.C. § 698 (the act establishing the Big Thicket National Preserve) the date of taking was (i) the date of valuation or (ii) the date of the filing of the commission's report or (iii) the date of the judgment or (iv) such other date as may be determined under the facts of this case.

4. Whether the Court of Appeals erred in failing to sustain the finding of the District Court that Kirby was deprived of the beneficial use of its property as of the filing of the complaint in condemnation, in the absence of a holding that such finding was clearly erroneous.

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* The caption of the case contains the names of all of the parties in the proceeding to be reviewed.

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BRIEF OF PETITIONER

Petitioner, Kirby Forest Industries, Inc. ("Kirby") herewith files its Brief on the merits, respectfully showing:

OPINIONS BELOW

The opinion of the Court of Appeals (Pet., App. A), styled United States of America v. 2,175.86 Acres of Land, is reported at 696 F.2d 351. The opinion of the District Court (Pet., App. B) is reported at 520 F. Supp. 75.

STATEMENT OF JURISDICTION

The judgment of the Court of Appeals was entered on January 24, 1983. Kirby filed its motion for rehearing on February 5, 1983, which was denied by the Court on March 10, 1983 (Pet., App. C). Petition for Writ of Certiorari was filed on June 7, 1983. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1) (1976).

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

The Fifth Amendment to the Constitution of the United States provides, in part:

> ". . . nor shall private property be taken for public use without just compensation."

40 U.S.C. § 257 (1976) provides:

> In every case in which the Secretary of the Treasury or any other officer of the Government has been or hereafter shall be, authorized to procure real estate for the erection of a public building or for other public uses, he may acquire the same for the United States by condemnation, under judicial process, whenever in his opinion it is necessary or advantageous to the Government to do so, and the Attorney General of the United States, upon every application of the Secretary of the Treasury, under this section and section 258 of this title, or such other officer, shall cause proceedings to be commenced for condemnation within thirty days from receipt of the application at the Department of Justice.[1]

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1. For the benefit of the Court, the provisions of the "Declaration of Taking" statute, 40 U.S.C. § 258a, and of Rule 71A, Fed. R. Civ. P., are printed in Appendices A and B hereto, respectively.

The provisions of 16 U.S.C. § 698, Pub. L. 93-439, Oct. 11, 1974, 88 Stat. 1254-61, the statute creating the "Big Thicket National Preserve," (hereafter, the "Act" and the "Preserve") under which this condemnation proceeding was filed, are printed in Appendix D to the Petition For Writ of Certiorari.

STATEMENT OF THE CASE

The Act was passed by Congress on October 1, 1974 and signed into law by the President on October 11, 1974, nearly eight years after the initial bill to authorize some form of Big Thicket enclave was introduced.[2] The Act included among the Preserve's "units" the 6,218 acre "Beaumont unit," which was publicly known prior to the passage of the Act to encompass Kirby's 2,175.86 acres of land involved here.[3] The boundaries of the several units were depicted on a map referred to in § 698(b) of the Act, which map clearly included Kirby's tract and was required by such section to be duly filed in the public records of the counties in question. Further, as required by § 698(b) of the Act, the Secretary of the Interior, through the Park Service, determined and published in the Federal Register on March 17, 1975, a detailed description of the boundaries of the Preserve, including the Beaumont unit. (Cozine, page 335).

This case began on August 21, 1978, by the filing of a complaint in condemnation (J.A. 5) under 40 U.S.C.

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2. The form of the enclave varied in successive bills from national park to national monument to national biological reserve to its final form, national "preserve", and consisted of twelve separate "units," some of which were connected by river corridors (the "string of pearls" concept). See Cozine, Assault on a Wilderness, The Big Thicket of East Texas, August, 1976 (Texas A & M University doctoral dissertation), hereafter referred to as "Cozine".

3. Kirby is an integrated forest products manufacturer, owning timberlands in East Texas and Louisiana to supply the raw material for its manufacturing facilities.

§ 257 (1976). Shortly thereafter, on August 30, 1978, the Government filed a notice of lis pendens in the record of the case (J.A. 7). The case was referred to a Commission under Rule 71A for value determinations.

On the first day of the hearing before the Commission, in response to the inquiry of the Chairman regarding stipulations, counsel for the Government and Kirby stipulated that that day, March 6, 1979, was the date of taking. (J.A. 19). All valuation testimony before the Commission was directed to the stipulated date of taking.

After entry of the Commission's report on March 3, 1980, the District Court, on August 13, 1981, entered its judgment adopting the Commission's findings awarding Kirby $2,331,202.00, plus interest at six percent per annum from August 21, 1978 (the date of the complaint) until deposit of the award. (J.A. 23). On March 26, 1982, while the case was on appeal to the United States Court of Appeals for the Fifth Circuit, the Government deposited the award.

The District Court determined that the date of the taking was the date of the filing of the complaint, based upon a finding that the "condemnation proceedings instituted by the United States Government have effectively denied Defendant (Kirby) economically viable use and enjoyment of its property since it is prevented from continuing its timber business." (See Pet., App. B, page B-10).

The Fifth Circuit reversed, Judge Jolly dissenting on this question. The majority held that because the Government had not taken actual possession, the date of payment of the award was the date of taking and that, therefore, no interest was due. Judge Jolly dissented on the question of the date of taking and, hence, Kirby's

entitlement to interest. He expressed the view that at least by the entry of a judgment in condemnation of unimproved property (distinguished from income-producing or improved property, which continues to provide benefits to the landowner) the landowner is "shackled from making economically viable use of his property," and, therefore, suffers a taking of his property at such time, if not before.

SUMMARY OF ARGUMENT

The position of Petitioner is supported by three alternative arguments, stated as follows:

I. Under the facts of this case, and applying the analysis made in regulatory power cases, a taking clearly occurred prior to deposit of the award, and therefore interest is due on the award; or

II. Under the facts of this case, and applying a different analysis to condemnation cases than to regulatory power cases, a taking clearly occurred prior to the deposit of the award, and therefore interest is due on the award; or

III. Considering the broader application of constitutional principles to condemnation suits, this Court should adopt minimum standards under the Fifth Amendment to apply to all federal condemnations under 40 U.S.C. § 257.

I.

Under the facts of this case, involving a condemnation for a wilderness preserve, the purpose of which is to preserve the natural environment by prohibiting all commercial exploitation of property, a taking occurred when acts of the Government effectively accomplished the pur-

pose of the condemnation. An owner of unimproved property against which a condemnation is pending for the purpose of preserving the property as is, *e.g.*, a wilderness preserve, a national seashore, a scenic view, is effectively prevented by the mere pendency of the condemnation suit from exercising his ownership rights which may hamper or destroy the purpose of the taking. This is particularly true here, where Kirby had agreed to a moratorium on logging and promised to continue it during the acquisition process, and Congress acted upon such promise. Kirby was denied economically viable use of its property after the filing of the complaint in condemnation, as the District Court correctly found.

Under the unquestioned principles previously announced by this Court, it is not necessary that the Government actually take possession, or that judgment be entered divesting the owner and investing the Government with title and right of possession, to have a "taking" of property. If Government actions deny an owner any economically viable use of his property, a taking occurs, as the Ninth Circuit in *United States v. 156.81 Acres of Land,* 671 F.2d 336 (9th Cir. 1982), in conflict with the Fifth Circuit in this case, has correctly held. The Fifth Circuit's reliance upon *Danforth v. United States,* 308 U.S. 271 (1939), as holding that a taking never occurs (absent possession) until payment is made, is misplaced and wrong. The Court of Appeals erred in rejecting the specific finding by the District Court that Kirby had been deprived of any viable economic use, and in suggesting its own remnant use, recreation. The District Court finding was not clearly erroneous under Rule 52(a), Fed. R. Civ. P.

Kirby, however, remains willing to abide by the stipulated date of taking, which it continues to regard as a

binding agreement reached in open court with Government counsel.[4]

In view of potential remand, and in order that a complete judgment on all issues may be entered in the Court below, Petitioner respectfully requests the Court to address, if interest is determined to be due, the question of the appropriate rate of interest and the means by which it is to be determined. Just compensation requires a market rate of interest. See *Phelps v. United States,* 274 U.S. 341 (1927), *United States v. Blankinship,* 543 F.2d 1272 (9th Cir. 1976).

Finally, even if the result reached by the Fifth Circuit as to the date of taking is affirmed, Petitioner should be afforded the opportunity, upon remand, to present evidence of increased value of its property through such date.

II.

Heretofore, few, if any, analytical distinctions have been made in "taking" cases between regulatory (police) power cases and eminent domain cases. While it has been recognized that passage of title is one quite apparent distinction (see, e.g., *Danforth*), where the contention is made that a taking in an eminent domain case under 40 U.S.C. § 257 occurred prior to passage of title, the same type of analysis given to police power cases has been applied to the eminent domain case [see *United States v. Rogers,* 255 U.S. 163 (1921)], and Petitioner makes that application here under Point I. We urge under Point II, alternatively, that a different analysis should be made, one which addresses

4. It has been Kirby's consistent position that it was bound by the stipulation, and its position will be no different before this Court. If the stipulation may properly be disregarded, however, then the date of taking found by the trial court should prevail.

the conceptual as well as the practical distinctions between the police power and the eminent domain power. The adoption by this Court of such analysis, moreover, will not depart from existing Fifth Amendment principles. Such analysis depends basically on the clear application of the principles (1) that value is to be determined as of the date of taking, *United States v. Miller,* 317 U.S. 369 (1943) and (2) that it is the deprivation of the owner and not the accrual of a right or interest to the sovereign, which constitutes the taking, *United States v. General Motors,* 323 U.S. 373 (1945).

Under such analysis, the assertion by the Government of the power of eminent domain, by a means which clearly defines the intent to take, is given special consideration in the analysis of whether a taking has occurred prior to the date of payment or passage of title. This element in the taking analysis is obviously not present in police power cases, which suggests that a different analysis should be made.

By considering the assertion of the power to take, a lesser degree of interference than that required in police power cases would be sufficient to constitute a taking in an eminent domain case.

III.

The condemnation procedure created by 40 U.S.C. § 257 allows unjust results to occur, contrary to the mandate of the Fifth Amendment that compensation for takings for public use shall be "just".

The problem inherent in "straight" condemnation proceedings is that the date of payment *always* follows the date of valuation. If the date of taking is determined to be the date of payment, then the date of taking is

always subsequent to the date of valuation, contrary to the elementary constitutional requirement that an owner is entitled to receive compensation based upon the value of the property *at the date of taking. United States v. Miller, supra; United States v. Klamath and Moadoc Tribes,* 304 U.S. 119 (1938).

Despite the difficulties presented in devising a uniform rule to determine whether takings occur in police power or inverse condemnation situations, Petitioner contends that a uniform rule may be stated in straight condemnation cases, the essential purpose of which is to prevent the distortions allowable under the existing procedure, and to assure that just compensation is paid.

The rule which Petitioner proposes may be stated as follows:

> Because in a straight condemnation (absent prior possessory acts) the filing of the complaint in condemnation is an assertion of a right and intent to take, the effect of which in every case is to impose a direct, material, and adverse interference with the ownership interests in the property, and which according to legitimate expectation will result in a divestiture of title for a public use, the date of taking for the purpose of determining just compensation is the date of the filing of the complaint.

The foregoing rule is consistent with existing principles and case interpretation, except that it ends the confusion in determining a date of taking (where it is contended that a taking occurred prior to the date of payment). It abolishes reliance on the arbitrary "date of payment" concept of taking by properly emphasizing the deprivation of the owner rather than the accrual of the right of the sovereign.

ARGUMENT

I.

Under The Facts Of This Case, A Taking Occurred As Of The Date Of The Filing Of The Condemnation Complaint By The United States, Which Denied Kirby The Economically Viable Use Of Its Property.

A. Nature of the Dispute.

The dispute in this case can be narrowed by first noting certain principles which are *not* in dispute. Just compensation, this Court has stated, means "the full and perfect equivalent in money of the property taken. The owner is to be put in as good position pecuniarily as he would have occupied if his property had not been taken." *United States v. Miller, supra.* It means the "Full equivalent of the value of [the use of the property] at the time of the taking paid contemporaneously with the taking." *Phelps v. United States, supra.* There is no dispute that an owner whose property is taken for public use is entitled to "just compensation" therefor, with value determined as of the date of taking. *United States v. Dow,* 357 U.S. 17, 20 (1958); *United States v. Miller, supra.* Neither is it disputed that where a "taking" precedes payment of compensation, the Fifth Amendment requires that interest be paid from such date as a part of just compensation. *United States v. Dow, supra; Seaboard Air Line Ry. Co. v. United States,* 261 U.S. 299 (1923); *United States v. Rogers, supra.* What is disputed in this case is whether a "taking" occurred prior to the payment of the award by the Government, such payment not being made until this case was before the Fifth Circuit, some *eight* years after Congress had designated this specific property to be preserved in a wilderness area, nearly *four* years after the condemnation suit was commenced and notice of lis pendens filed, *three*

years after a stipulated "date of taking" and date of valuation, and *seven months* after the District Court's judgment. Throughout such time, the property was preserved in its wilderness condition, which was the basis for the public acquisition of the property. During this period, in keeping with promises made to Congress, (see p. 17, *infra*), Kirby cut no timber and undertook no development, paying taxes all the while. Yet, the United States would have this Court hold that Kirby has received the "full and perfect equivalent in money of the property taken" and has been put in "as good a position pecuniarily as [it] would have occupied if the property had not been taken." Such a conclusion simply cannot be made under modern concepts of "taking" and "property".

B. Historical Treatment of Possession as Prerequisite for Taking.

Early English concepts of "taking" and "property" involved the idea that "taking" required actual invasion and "property" meant the physical *res,* with no obligation of the sovereign to pay for property merely damaged, but not seized.[5] Although the English concept of requiring compensation to a property owner for the physical deprivation of property, grounded in the Magna Carta[6] and Blackstone's Commentaries,[7] was imported to the American colonies, a view existed in certain colonies that undeveloped land was so valueless that no compensation was due when it was taken by the government.[8]

The judicial trend in this country since the adoption of the Fifth Amendment has been toward an expanding

5. Nichols on Eminent Domain (1979 and 1983 Supp.) ¶ 1.21.

6. *Id.*

7. 1 Bl. Comm. 139.

8. Bosselman, F., "The Taking Issue" (U.S. Gov't. Printing Office 1973) at 85.

recognition that "takings" are not of the physical *res* itself but of the ownership rights and interests therein, thus requiring no actual invasion of the premises. Since *Pennsylvania Coal Co. v. Mahon,* 260 U.S. 393 (1922), this Court has consistently recognized that mere regulation of property, "if regulation goes too far . . . will be recognized as a taking." Where a governmental action or regulation causes a loss to an owner "as complete as if the United States had entered upon the surface of the lands and taken exclusive possession of it," *United States v. Causby,* 328 U.S. 256, 261 (1946), or where a regulation "denies an owner economically viable use of his land," *Agins v. City of Tiburon,* 447 U.S. 255, 260 (1980), *Penn Central Transportation Co. v. City of New York,* 438 U.S. 104 (1978), a taking occurs.

Consistently with the expansion of the taking concept, the concept of property has come to mean the legal relationship between owner and property: "The legal relations of the individual cover every aspect of his existence, and when there is violation of these relations his property is taken". Cormack, *Legal Concepts In Cases Of Eminent Domain,* 41 Yale L. J. 221, at 259 (1931). ". . . '[P]roperty' in eminent domain means every species of interest in land and things of a kind that an owner might transfer to another private person." Stoebuck, *A General Theory Of Eminent Domain,* 47 Wash. L. Rev. 553, 606 (1972, hereinafter "Stoebuck").[9] The matter is settled in this Court. In *United States v. General Motors,* 323 U.S. 373 (1945), Justice Roberts for the Court held that the proper construction of the word property in its "more accurate sense," denoted "the group of rights inhering in the citizen's relation to the

9. See also, Cohen, *Property and Sovereignty,* 13 Cornell L. Q. 8 (1927), and Michelman, *Property, Utility, and Fairness: Comments on the Ethical Foundations of "Just Compensation" Law,* 80 Harv. L. Rev. 1165 (1967), (hereafter, "Michelman").

physical thing, as the right to possess, use and dispose of it." (323 U.S. at 378).

Just as judicial concepts of the types of property interests protected by the Fifth Amendment have broadened, so, too, has the judicial recognition of the value of unimproved property. Not only is such property entitled to Fifth Amendment protection, but indeed may have characteristics which render governmental actions with respect to it a "taking" in circumstances where improved, income-producing property may not be found to have been taken. The lack of early American cases concerning acquisition for unimproved land may stem from the aforementioned colonial idea that compensation for unimproved land was unnecessary, from the abundance of such land during the country's early years,[10] or from the fact that acquiring land for parks or wilderness areas is a comparatively recent phenomenon. See *Shoemaker v. United States,* 147 U.S. 282, 297 (1893).

In more modern times, however, courts have given greater recognition to the unique burdens placed upon unimproved lands targeted for preservation. In *Bydlon v. United States,* 175 F.Supp. 891 (Ct. Cl. 1959), an executive order banned airplane flights to property in a remote corner of a public wilderness region, the Superior National Forest in Minnesota. After noting that the purpose of the executive order was "protecting the public welfare by means of preserving for public recreational use the aesthetic values of the wilderness," the Court of Claims found that a "taking" of the private property had occurred. *Cf. Drakes Bay Land Co. v. United States,* 424 F.2d 574 (Ct. Cl. 1970) (Delay and actions by the United States

10. "When thousands of square miles of arable land were unused and unoccupied, unimproved land, although held in private ownership, had no substantial value." 1 Nichols on Eminent Domain (1979) ¶ 1.22[1].

to prevent development of unimproved land designated for inclusion in a national seashore held a taking.)

In 1969, the Supreme Court of New Jersey, on facts analogous to the instant case, held that the filing of a condemnation complaint to acquire vacant, unimproved land in a state "Green Acres" program constituted a taking, and awarded interest from the date of the complaint:

> The economic realities of the situation preclude improvement, since the valuation of the property is frozen the day the complaint is filed, preclude leasing, since the tenancy would be precarious, and preclude sale, since the complaint is a substantial cloud on the title. The landowner's property is virtually straitjacketed, but tax and mortgage obligations continue unabated.

State v. Nordstrom, 54 N.J. 50, 253 A.2d 163, 166 (1969).

Five years later, in a case also dealing with unimproved property, the Alaska Supreme Court adopted the reasoning of *Nordstrom*, which it characterized as "sensitive to the economic realities of public condemnation," holding:

> If as a matter of constitutional law the property owner is entitled to interest from the moment the State takes legal possession, he should, *a fortiori*, receive interest where he has been deprived of all the economic advantages of legal ownership but is relieved of none of the liabilities.

Stewart & Grindle, Inc. v. State, 524 P.2d 1242, 1247 (Alaska, 1974).

In addition to the two Ninth Circuit cases discussed *infra*, recent decisions by other federal courts have also awarded interest prior to the passage of title to title in

condemnation proceedings, focusing on the economic realities of public condemnation. The District Court decision in the instant case (by Judge Robert M. Parker) followed a decision in the same district by Judge Joe H. Fisher awarding interest from the date of a commission award in another Big Thicket case. *United States v. 59.29 Acres of Land,* 495 F. Supp. 212 (E.D. Tex. 1980). Judge Fisher who, like Judge Parker, was thoroughly familiar with the effects of the numerous Big Thicket condemnation suits pending in the Eastern District of Texas, held that a landowner does not receive the full equivalent of the value of his property paid contemporaneously with the taking when there is a significant delay between the date of valuation and date of payment. 495 F. Supp. at 216. See also, *Foster v. City of Detroit,* 254 F. Supp. 655 (E.D. Mich. 1966), *aff'd,* 405 F.2d 138 (6th Cir. 1968) (dealing with improved property); *United States v. Certain Lands in Eastham, Truro and Wellfleet,* C.A. No. 68-208-C, (Order of May 28, 1982), *infra,* Appendix C.

C. Effects of the Condemnation Proceeding on the Property in Question.

Although Kirby does not suggest that a taking occurred at a time prior to the filing of the Government's condemnation complaint in this case, nevertheless an understanding of the events giving rise to the condemnation proceeding is necessary to demonstrate the effect of the filing of such complaint on the property in question.

Interest in preserving certain areas of the Big Thicket, including that portion of Kirby's property involved here, has long existed, but intensified after the Advisory Board on National Parks, Historic Sites, Buildings and Monuments conducted studies of the area in 1965-1967. See

S. Rep. No. 875, 93d Cong. 2d Sess. U.S. Code Cong. & Ad. News, 5554, 5555 (hereinafter cited as "Leg. Hist. at ____"). See also, Cozine, page 210. Bills to establish a Big Thicket park or preserve were introduced beginning in the 89th Congress in 1966. *Id.*, page 221. Passage of P.L. 93-439 ultimately occurred in October, 1974. *Id.*, p. 326. The Big Thicket Preserve was established amid fears that "logging, clearing for agricultural uses and oil field operations, and more recently, vacation home subdivisions" were dividing the Big Thicket into "blocks of ecological islands" which "were steadily being encroached upon." Leg. Hist. at 5555.

Kirby's property at issue in this case was unique among the various "ecological islands" making up the Big Thicket Preserve in two respects: its near-total lack of logging or development and its proximity to the growing city of Beaumont, Texas, a city of 118,000 in 1970. (1970 Census). As to the natural state of Kirby's property, S. Rep. 93-875 noted:

> [I]t remains perhaps the wildest component of all of the units to be included in the Preserve. . . . Although some cypress may have been harvested in the area at some time, part of it has never been logged and it is doubtful that a better stand of basic hardwoods exists anywhere in North America.

Leg. Hist. at 5557.

Thus, the value of the property in question to the United States lay principally in its *non-use*, or preservation in its natural state, particularly as to timber cutting. A problem which faced Congress was how to maintain the wilderness state of such property during the acquisition process. The original House-passed bill provided for a "legislative taking", but in Committee, the Senate amended the proposed statute to delete that provision. Two specific

reasons prompted the change: (1) the economic cost to the National Park Service acquisition program of having interest run from the date the Act became law, and (2) the Committee's belief that the areas to be included in the Preserve were not in imminent danger of destruction. *Id.* at 5558. The basis for the belief that the Preserve areas were not threatened is important to the resolution of this case:

> The Committee was assured during the hearings on this legislation that those timber companies with holdings in the area will, in good faith, continue the moratorium once specific boundaries are designated.

Id.

It should be noted that both reasons for the Senate's deletion of a "legislative taking" provision proved to be well-founded. Rather than interest beginning to run as of a legislative taking date in October, 1974, the earliest date upon which interest is claimed by Kirby is August 21, 1978, almost four years later. Secondly, Congress' reliance on Kirby's "good faith" proved to be justified. Kirby neither cut timber nor conducted any development on the land between 1974 and 1982, when title passed to the United States, preserving the property in the same pristine condition which Congress desired. Kirby thus stands penalized for refraining from accepting the open invitation present in the rationale of the Fifth Circuit: *to cut down the trees.* The argument that the Government did not "in any way interfere with [Kirby's] use of the property," cannot be sustained, as the District Court recognized and found.

D. Decisions of Fifth and Ninth Circuits.

The holding of the Fifth Circuit below as to the date of taking of Kirby's property conflicts with two Ninth

Circuit cases awarding interest prior to payment of awards.[11] The Fifth Circuit followed what it perceived as the directives of *Danforth v. United States,* 308 U.S. 271 (1939) in concluding that no interest is due a landowner prior to payment of the award and passage of title. Because *Danforth's* applicability, or lack thereof, underlies the conflict between the Fifth and Ninth Circuits, it is important to consider the facts and the precise holding of *Danforth* before focusing on the Fifth and Ninth Circuit decisions.

1. Danforth.

Two important aspects of this Court's decision in *Danforth* were overlooked or misunderstood by the Fifth Circuit Court. First, the *Danforth* Court based its holding on the particular facts and statute before it, which differ markedly from the facts and statute of the instant case. Secondly, the *Danforth* opinion itself recognized that a taking can occur prior to passage of title depending upon the burden actually placed on property by Government action, and did not purport to establish the inflexible rule ascribed to it by the Fifth Circuit.

Danforth construed the Flood Control Act of 1928, 33 U.S.C. §§ 702a - 702m, which authorized the Secretary of War to acquire lands or easements for flood control projects on the Mississippi River. The property owner in *Danforth* contracted with the United States Army for the conveyance of a perpetual flowage easement at a set price. The Government attempted to withdraw from its contract and have the easement's value redetermined in

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11. *United States v. 15.65 Acres of Land,* 689 F.2d 1329 (9th Cir. 1982); *United States v. 156.81 Acres of Land,* 671 F.2d 336, 338 (9th Cir. 1982), *cert. den.,* _____U.S._____, 103 S.Ct. 569 (1982).

a condemnation suit, but this Court enforced the contract as to value. In *Danforth*, a set-back levee was constructed to channel floodwaters through an area including Danforth's land, which was to be inundated in times of severe flooding by means of a lowered "fuse-plug" levee. The set-back levee was not located on Danforth's land. Although Danforth alleged that a taking occurred when the set-back levee was completed, both the fuse-plug and the main levee remained at the same height as prior to construction of the set-back levee. 308 U.S. at 286. Thus, Danforth's property was as well protected from flooding as it had been prior to construction of the set-back levee. *Id.* No argument was presented or considered in *Danforth* that the owner therein was deprived of all economically viable use of his land.

The Fifth Circuit has apparently held that *Danforth* establishes a rule in all straight condemnation cases that taking occurs when payment of an award is made. Such construction is refuted by *Danforth* itself, where this Court stated: "The Government could become liable for a taking, in whole or in part, even without direct appropriation, by such construction as would put upon this land a burden, actually experienced, of caring for floods greater than it bore prior to the construction." 308 U.S. at 286. The Court then noted that no such burden was present in *Danforth* because the property enjoyed the same protection from floods as prior to construction of the levee in question. The Court's reference to the burden which may be placed on property presents the question in the instant case of whether Kirby's property "actually experienced" a greater burden after the filing of the condemnation complaint "even without direct appropriation", in the words of *Danforth*. That Kirby experienced a burden as to its property because of the condemnation suit is apparent,

and the District Court so found. The District Court, consistently with the Ninth Circuit, the Supreme Courts of New Jersey and Alaska, and the other federal cases cited *supra,* properly recognized the economic realities of the burdens experienced by Kirby, in keeping with the above-quoted language in *Danforth,* as well as with the qualifying phrase preceding the holding in *Danforth*: "Unless a taking has occurred previously *in actuality,* or by a statutory provision [the taking occurs upon payment of the award]." 308 U.S. at 284, [emphasis added]. *Danforth* also held that for the completion of the set-back levee to amount to a taking, "it must result in an appropriation of the property to the uses of the Government." 308 U.S. at 286. The "uses of the Government" in preserving a wilderness are simply to accomplish *non-use* by the owners, thereby preventing the use of the property or any interests therein in any manner inconsistent with the integrity of the land as a wilderness. This goal is effectively accomplished by the "chilling" effect of the acts of the Government in pursuing the announced acquisition of the designated lands. Kirby's contention (in fact supported by *Danforth*) is precisely this: that, in actuality, a taking occurred at the time of the complaint as a result of the burdens, actually experienced, which effectively appropriated Kirby's property to the uses of the Government.

2. The Fifth Circuit Position.

The Fifth Circuit, "on the authority of *Danforth*", held that where the Government proceeds by straight condemnation, and "has not entered into actual possession or substantially interfered with the landowners' rights in their property prior to payment, the date of taking is the date of payment." 696 F.2d at 357. The majority (with

Judge Jolly dissenting on this question) gave the following reasons for its decision:

(1) The government may back out of the project until payment, "[j]ust as in *Danforth.*"

(2) The government, "as in *Danforth* . . . has not yet appropriated the landowners' property to the uses of the government."

(3) "In fact, Danforth had suffered more injury than the landowners here, since his land had already been flooded as a result of the government's flood control operations."

Id. at 356.

As to the first reason stated, it was indeed theoretically possible for the United States to "back out" of the Big Thicket project even after the complaint in this suit was filed. Such a *possibility,* however, ignores the *realities* that (i) Congress declared, in § 698(a) of the Act, that the Big Thicket National Preserve "is hereby established", (ii) Kirby's property had been designated by Congress, and by metes and bounds description in the Federal Register, to be included in the Preserve, (iii) Congress had directed the "prompt" acquisition of the property by the National Park Service, (iv) Kirby's tract had "the highest rank in wilderness quality in the entire area studied" [Leg. Hist. at 5567, Recommendations of Department of The Interior], (v) acquisition of other tracts in the project was well underway and (vi) the United States had filed a notice of lis pendens shortly after the filing of the complaint, casting a cloud on Kirby's title. The fact that the overwhelmingly likely event of Government acquisition did in fact occur in this case undermines the weight of the Fifth Circuit's conjecture as to possible abandonment.

The Fifth Circuit's second reason for its holding—that the Government had not yet appropriated Kirby's property for its use—defies both logic and the facts of this case. The "use", actually the non-use, made of Kirby's property subsequent to the complaint was its preservation as a wilderness. It strains credulity to say that valuable timberland, withheld from harvesting by a timber company in keeping with promises relied upon by Congress, had not been appropriated to the wilderness preservation use of the Government. The insight of the New Jersey Supreme Court in *Nordstrom* on this point is enlightening:

> [T]he need for compensation is particularly acute in a case, such as the present one, where the burden placed upon the landowner during the intermediate period corresponds to a benefit conferred upon the State. Here unimproved land was being condemned for the purpose . . . of maintaining the property in its unimproved condition. In effectuating the State's condemnation purpose during the intermediate period the Nordstroms were being subjected to a "scenic easement", a benefit to the State. . . .

253 A.2d at 166.

The Fifth Circuit's third stated basis for its holding—that Danforth suffered more injury than Kirby—erroneously characterizes the *Danforth* facts. True, as the Fifth Circuit noted, Danforth's lands were actually flooded when the Government made crevasses in a levee during a record flood. But, as this Court noted, "the land of [Danforth] would have been flooded without the crevassing." 308 U.S. at 279. After the flood, the levee was restored to its former height and the land was "as well protected from destructive floods as formerly." 308 U.S. at 286. Additionally, of course, the Government acquired only an easement over Danforth's land, the use of which was

presumably otherwise retained, whereas Kirby's economic use of its property was wholly frustrated.[12]

The fault of the Fifth Circuit majority decision lies in its rigid application of selected language from *Danforth* out of context, its failure to give proper weight to other language of *Danforth* dealing with burdens actually experienced by a landowner, its mischaracterization of the facts in *Danforth* and its refusal to recognize, as did the District Court, the economic realities of Kirby's situation, all of which totally distinguish this case from *Danforth.*

3. The Ninth Circuit Position.

In contrast to the Fifth Circuit, and with a marked similarity to the District Court in this case as well as to *Nordstrom* and *Stewart & Grindle,* the Ninth Circuit has explicitly recognized that blind application of selected portions of *Danforth* makes little sense in the face of obviously different facts. Consistently with the pronouncements of this Court,[13] two separate Ninth Circuit panels have recognized that "there is no simple formula for establishing when property has been taken," *United States v. 15.65 Acres of Land,* 689 F.2d 1329 (9th Cir. 1982) and that "[t]he Supreme Court has refused to adopt any hard and fast rule determining when a taking occurs," *United States v. 156.81 Acres of Land,* 671 F.2d 336, 338 (9th Cir. 1982), *cert. denied,* ____

12. The Fifth Circuit, in refusing to distinguish between improved and unimproved property, stated that a judgment in condemnation of unimproved wilderness land did not deprive the owner of a "present use" because "the wilderness property continues to provide recreational uses." 696 F.2d at 357. It gave no basis for its statement nor any indication of whether it considered such use to have economic value analogous to rents and profits from improved property.

13. *Kaiser Aetna v. United States,* 444 U.S. 164 (1979); *Penn Central Transportation Co. v. City of New York,* 438 U.S. 104 (1978).

U.S.____, 103 S.Ct. 569 (1982). Although the two Ninth Circuit panels differed as to when the taking occurred,[14] both cases properly read *Danforth* as requiring an inquiry into the burdens actually experienced by the property interests in question.

As to the economic burdens actually experienced during a condemnation of unimproved land designated for preservation purposes, the Ninth Circuit noted:

> [T]he owner following a condemnation suit frequently loses more than just value; he may be deprived of all economic use of his land. While the action is pending, the land is almost impossible to sell, although that alone is not sufficient to create a taking. *Agins v. Tiburon*, 447 U.S. 255, 263 n.9, 100 S.Ct. 2138, 2142 n.9, 65 L.Ed.2d 106 (1980). Also, as was pointed out in the majority in *United States v. 156.81 Acres*, 671 F.2d 336 (9th Cir. 1982), no one would improve the property after the date of valuation because the government could acquire it at a pre-improvement price. [Citations omitted.] The owner of unimproved land is thus left with the liabilities which follow title but none of the benefits, save the right ultimately to be paid for the taking.

United States v. 15.65 Acres of Land, 689 F.2d at 1334.

E. What Constitutes a Taking of Property.

The Ninth Circuit's approach squares with the approach of this Court in *Penn Central Transportation Co. v. City of New York*, 438 U.S. 104 (1978), and other cases

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14. In *United States v. 15.65 Acres of Land*, a stipulated date of *valuation* was held to be the date of taking where such valuation preceded trial by more than a year, 689 F.2d at 1334. In *United States v. 156.81 Acres of Land*, where valuation preceded trial by only one month, the date of *judgment* was held to be the date of taking. 671 F.2d at 340.

cited therein, in considering on a case-by-case basis the factors alleged to constitute a taking. This Court identified the following factors as bearing upon the question of whether a taking has occurred: (i) the economic impact of Government action on the claimant, (ii) the reasonable investment-backed expectations of the property owner and (iii) the character of the governmental action. 438 U.S. at 124; *See, also, Kaiser Aetna v. United States,* 444 U.S. 164 (1979).

Consideration of the first factor above, the economic impact of Government action, leaves considerable room to determine whether a taking has occurred in cases where a property owner continues to receive substantial economic benefits despite the governmental interference. *See, e.g., Shoemaker v. United States,* 147 U.S. 282 (1893) ("But the owner was in receipt of the rents, issues and profits during the time occupied in fixing the amount to which he was entitled." 147 U.S. at 321.); *Gould v. United States,* 301 F.2d 557, 559 (D.C. Cir. 1962) ("Until then [date of payment of award] the owners continued to hold title as well as possession of the property and received income from it."). In marked contrast to cases where an owner receives rents or profits from property during condemnation, Kirby received nothing but tax liabilities from its property during the almost four years of condemnation proceedings before payment.

Recent decisions of this Court attribute significant weight to a second factor in the analysis of whether a taking has occurred: the interference of government with reasonable investment-backed expectations of a property owner. *Penn Central,* 438 U.S. at 136-37; *Kaiser Aetna,* 444 U.S. at 179. The crux of this Court's holding that a "taking" did not occur in *Penn Central* was the determination that the New York City ordinance in question (1) did

not deprive Penn Central of a reasonable rate of return on its property, (2) did not prevent the property's existing use, and (3) allowed Penn Central to transfer valuable development rights. The facts of the instant case are revealing by comparison: Kirby's rate of return during this suit was not only not reasonable, it was non-existent. Both timber harvesting and development were entirely prevented by the contemplated government use. Kirby's investment-backed expectations were totally frustrated.

The third factor identified in *Penn Central,* the character of the government action, is discussed, *ante* at pp. 15-17, to which reference is made. Petitioner emphasizes to the Court that the action taken here is similar to the action taken by the United States in *Kaiser Aetna*: the filing of a lawsuit (although not a condemnation suit) to determine Kaiser Aetna's right to exclude the public from a marina. If the Government had succeeded in enforcing a navigational servitude in that case, it would have had the effect of an actual invasion of the property. 444 U.S. at 180.

The analysis outlined above is demonstrated in numerous cases decided by this Court, although this case presents a question not previously decided: where the uses of the government in the preservation of a wildnerness are accomplished by the mere pendency of condemnation proceedings, has a taking occurred? That it has in this case is readily demonstrated by applying basic principles previously adopted by this Court.

The basic concept applicable here is that it is the deprivation of the owner, and not the accrual of a right or interest to the sovereign, by which the determination of whether a taking has occurred is measured. That this concept is the primary question in the taking analysis was noted by Justice Holmes for the Court in *Boston Chamber*

of Commerce v. City of Boston, 217 U.S. 189 (1910), where the question was whether the existence of an easement to which the fee was subject could be ignored in determining value. The Court announced the rule:

> "[T]he Constitution . . . requires that an owner of property taken should be paid for what is taken from him. It deals with persons, not with tracts of land. And the question is what has the owner lost, not what has the taker gained."

217 U.S. at 195.

The rule found its most prominent exposition in *Pennsylvania Coal Co. v. Mahon, supra*, a police power case. There again, Justice Holmes for the Court (Justice Brandeis dissenting) set forth the following often-cited language:

> Government hardly could go on if to some extent values incident to property could not be diminished without paying for every such change in the general law. As long recognized some values are enjoyed under an implied limitation and must yield to the police power. But obviously the implied limitation must have its limits or the contract and due process clauses are gone. One fact for consideration in determining such limits is the extent of the diminution. *When it reaches a certain magnitude, in most if not in all cases there must be an exercise of eminent domain and compensation to sustain the act.*

260 U.S. at 413 (emphasis added).

More pointedly, however, this Court in *United States v. General Motors, supra*, settled the question. There, in holding that compensation was due for the full measure of the loss of temporary occupancy of a building, includ-

ing consideration of move-out and other related expenses, the Court, through Justice Roberts, reasoned as follows:

> In its primary meaning the term "taken" would seem to signify something more than destruction, for it might well be claimed that one does not take what one destroys. But the construction of the phrase has not been so narrow. *The Courts have held that the deprivation of the former owner rather than the accretion of a right or interest to the sovereign constitutes the taking.* Governmental action short of acquisition of title or occupancy has been held, if its effects are so complete as to deprive the owner of all or most of his interest in the subject matter, to amount to a taking.

323 U.S. at 378 (emphasis added.)

It is manifest from the foregoing cases, and others such as *Dugan v. Rank,* 372 U.S. 609 (1963) and *Penn Central Transportation Co. v. City of New York, supra* (see 438 U.S. at 123, n.23), that where the Government acts, without the necessity of actual possession or the accrual of an interest (such as the passage of title), to subordinate the owner's interests to the uses of the Government, which results in the deprivation of profitable use thereof by the owner, a taking in Fifth Amendment analysis occurs.

Further, as we have seen, *infra,* p. 12, the "property" interest with which the act of the Government interferes is the ownership interest in the rights incorporated within the concept of title. The filing of the complaint in condemnation (alone would be sufficient but certainly with the contemporaneous filing of a notice of lis pendens) interferes with that ownership interest. And where the purpose of the Government is to accomplish its goal precisely by

that interference, i.e., to require *non-use* of the property, such an interference may be compared without inaccuracy to a direct invasion. According to Professor Michelman, the "negative restraint" involved in seeking to prevent use in order to preserve some physical characteristic of the property is no different from "affirmative occupancy."[15]

Clearly, a direct invasion or "affirmative occupancy" is a taking, *Loretto v. Teleprompter Manhattan CATV Corp.*, ____U.S.____, 102 S.Ct. 3164 (1982), and manifestly would satisfy any standard allowing interest to be paid where taking precedes payment of the award.

The view that an interference which effects the equivalent of a servitude constitutes a taking is supported by *United States v. Dickinson*, 331 U.S. 745 (1947), in which Justice Frankfurter for a unanimous Court held that

> Property is taken in the constitutional sense where inroads are made upon an owner's use of it to an extent that, as between private parties, a servitude has been acquired either by an agreement or in course of time.

331 U.S. at 748.

Such view is also supported by the views of Justice Brennan in his dissent in *San Diego Gas & Electric Co. v.*

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15. Michelman, page 1186-1187: "Just as we say, when government behaved as though it owns an easement of way over my land (by regularly passing through), that it has 'taken' the 'property' consisting of such an easement and therefore must pay for it, we may say that when government behaves as though it owns a servitude burdening my land (by threatening to invoke a judicial remedy to prevent my making a certain use of it) it has 'taken' the 'property' consisting of the servitude and therefore must pay for it. Wordplay—in short dogged adherence to the constitutional formulas of 'taking' and 'property'—cannot justify any sharp line of distinction between governmental encroachments which take the different forms of affirmative occupancy and negative restraint."

City of San Diego, 450 U.S. 621 (1981).[16] There, Justice Brennan remarked as follows:

> It is only logical, then, that government action other than acquisition of title, occupancy or physical invasion can be a "taking," and therefore a *de facto* exercise of the power of eminent domain, where the effects completely deprive the owner of all or most of his interest in the property.

450 U.S. at 653.

It is clear that with the cloud on title imposed by the condemnation suit, Kirby was effectively prevented from (1) selling the land, (2) selling the timber, (3) building improvements, (4) mortgaging the property, (5) cutting the timber and (6) subdividing and selling lots. In short, there were no "investment-backed expectations" or "economically viable uses" which remained. Kirby was deprived of all or most of its interest in the property. The interference therefore effectively took the property, entitling Kirby to just compensation from the date of the filing of the complaint.

F. The District Court's Finding Was Not Clearly Erroneous.

The Fifth Circuit erred, under Rule 52(a), Fed. R. Civ. P., in rejecting the District Court's finding that the filing of the condemnation complaint "effectively denied Defendant (Kirby) economically viable use and enjoyment of its property since it is prevented from con-

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16. Joined in his discussion of the merits presented by that case by Justices Stewart, Marshall and Powell, Justice Brennan's views may be regarded as the views of a majority of the Court then sitting in view of the observation by Mr. Justice Rehnquist in his concurring opinion that as to the merits he "would have little difficulty in agreeing with much of what is said . . ." by Justice Brennan. (450 U.S. at 634).

tinuing its timber business." 520 F. Supp. at 80.[17] Findings of fact, including inferences and conclusions of the trial court, are not to be disturbed on appeal unless clearly erroneous. *United States v. Singer Manufacturing Co.*, 374 U.S. 174 (1963); *United States v. United States Gypsum Co.*, 333 U.S. 364 (1948). The Fifth Circuit did not indicate whether it was applying a clearly erroneous standard to the findings of the District Court, but instead referred to there being "no orders from the government not to reinstate logging operations" and said Kirby had made "no showing that the filing of the complaint deprived the landowners of the use of their property." 696 F.2d at 355. Because it was undisputed that (i) the timber companies had expressly promised Congress not to harvest timber during acquisition proceedings [Leg. Hist. at 5558], (ii) that Kirby had in fact observed such a promise, (iii) that the Government had filed a notice of lis pendens in order to cloud the title to the land and (iv) that Kirby had remained liable for taxes on the property during the proceeding, there is ample support for the District Court's finding, which easily passes muster under the "clearly erroneous" standard of Rule 52(a).

G. The Stipulated Date of Taking.

Attorneys for Kirby and the United States stipulated at the hearing before the commission appointed to value the property that the "date of taking" herein was March

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17. This finding, which is not a conclusion of law, was set forth in the District Court's opinion, which adopted findings of fact of the Commission except as to prejudgment interest, which was not argued before the Commission. As to prejudgment interest, the portion of the District Court's opinion quoted above constitutes such Court's findings of fact. As Rule 52(a) states, "If an opinion or memorandum of decision is filed, it will be sufficient if the findings of fact and conclusions of law appear therein."

6, 1979 (J.A. 19). Although Kirby believes the District Court's determination that a taking occurred as of the date of the complaint is supported both by the facts and the authorities, Kirby remains willing to abide by the stipulated date of taking, some seven months after the complaint was filed.

The Government has relied below on *United States v. Mahowald,* 209 F.2d 751 (8th Cir. 1954) in arguing that it is not bound by a stipulation as to the date of taking. The stipulation in *Mahowald,* however, was an informal agreement reached in chambers. The stipulation in the instant case, by contrast, was formally made a part of the record at the valuation hearing. "Date of taking" is a term of art in condemnation proceedings, and a stipulation in open court by experienced trial counsel as to "date of taking" rather than "date of valuation" should bind both parties, particularly, as here, where the property is already dedicated to the proposed government use.

Additionally, this Court has readily given effect to agreements between landowners and the United States as to the *valuation* of property in condemnation suits. *Danforth* held a letter agreement between a landowner and a district engineer to be binding as to valuation in a subsequent condemnation suit. *Albrecht v. United States,* 329 U.S. 599 (1947), similarly enforced a contract as to valuation in a condemnation suit. No reason exists why a stipulated, on-the-record agreement between counsel, during a condemnation suit, as to the "date of taking" should be any less binding than a letter agreement or contract between non-attorneys prior to suit as to valuation.

H. Interest on Remand.

The District Court awarded interest at six percent per annum, the legal rate of interest under Texas law.

Because interest from the date of taking is an element of just compensation under the Fifth Amendment, it "cannot be made to depend upon state statutory provisions." *Seaboard Air Line Ry. Co. v. United States*, 261 U.S. 299 (1923). Just compensation means "the full equivalent of the value of [the use of the property] at the time of the taking paid contemporaneously with the taking." *Phelps v. United States*, 274 U.S. 341 (1927). *See, also, United States v. Miller*, 317 U.S. 369 (1943). This point was raised in the Court of Appeals, but because of its holding on the taking question, was not addressed by the Court. Therefore, on remand the District Court should be directed to determine a proper rate of interest based upon interest rates obtainable by "a reasonably prudent person investing funds so as to produce a reasonable return while maintaining safety of principal." *United States v. 429.59 Acres of Land*, 612 F.2d 459, 465 (9th Cir. 1980). *See, also, United States v. Blankinship*, 543 F.2d 1272 (9th Cir. 1976) (holding 6% interest rate specified in Declaration of Taking Act, 40 U.S.C. §§ 258a - 258e, to be a floor, rather than a ceiling, on interest payable on a deficiency of funds deposited at time of commencement of suit); *United States v. 319.46 Acres of Land*, 508 F.Supp. 288 (W.D. Okla. 1981).

I. Gap Between Valuation and Passage of Title.

The Fifth Circuit's denial of interest to Kirby produces a result totally contrary to the well-established rule that the Fifth Amendment requires that the owner of property receive the full equivalent of its value as of the date of taking.[18] Although Kirby's property was valued

18. *United States v. Dow*, 357 U.S. 17 (1958); *United States v. Reynolds*, 397 U.S. 14 (1970).

as of March 6, *1979*, the valuation award was not paid until March 26, *1982*, which the Fifth Circuit found to be the date of taking. Using the Fifth Circuit's date of taking, the payment to Kirby was based on a valuation not as of such date, but three years prior thereto. Apart from underscoring the fact that Kirby has received less than just compensation for its property, this result, if affirmed by this Court, requires that Kirby at least be afforded the opportunity, upon remand, to establish the increase in value of its property through March 26, 1982.

On this point, the Fifth Circuit stated: "The landowners have made no showing that property values have in fact risen." 696 F.2d at 356. The Court has imposed an impossible burden. How was Kirby to "make a showing" that property values had increased by the Fifth Circuit's date of taking, when payment occurred during the pendency of this case before the Fifth Circuit? The only hearing for valuation purposes had occurred three years previously. Although at the hearing on objections before the District Court, counsel for both parties referred to the need for evidence as to valuation at a later date, the District Court's interest award mooted the question. Kirby has in fact had no opportunity to present evidence as to increase in value through the date of taking fixed by the Fifth Circuit. Should this Court affirm the Fifth Circuit as to the date of taking, the Fifth Amendment requires that Kirby be allowed to present evidence on remand as to increase in value of its property through March 26, 1982. As discussed in Point III, *supra*, the problem of an award being deposited long after the date of valuation upon which such award is based is one of the fundamental flaws of a rule holding that payment of an award and passage of title determine when a taking occurs.

II.

The Assertion By The Government Of The Power Of Eminent Domain Under 40 U.S.C. § 257 Is Properly An Element In The Taking Analysis, Requiring An Analysis Different From Police Power Cases.

As we have shown in Point I, value is to be determined at the date of taking, *United States v. Miller, supra,* the deprivation of the owner rather than the accrual of a right to the sovereign is the measure of the taking, *United States v. General Motors, supra,* and the concept of property involved in Fifth Amendment analysis is the legal relationship rather than the *res. Id.* The result of the application of such principles to this case is clear: neither possession nor passage of title nor the payment of the award can be the *sine qua non* in the taking analysis: the emphasis lies with the deprivation suffered by the owner.

Building on such principles, as an alternative approach to that taken under Point I, we urge that eminent domain cases require a separate analysis to determine the taking question. In the reported cases, the taking question arises most frequently in police power or inverse condemnation situations. This Court has announced, essentially beginning with *Pennsylvania Coal Co. v. Mahon,* and carrying forward to the recent *Penn Central* and *Agins* cases, that the analysis to determine the balance between the regulatory power and the right to compensation for governmental takings depended on the facts of each case, principally because of the varying degrees of interference found in the different cases. This case, arising under the exercise of the power of eminent domain, while referring to principles announced in police power cases, does not depend upon the same analysis. With the assertion of the power of eminent domain, the government purports to exercise

a power different from the regulatory power, and to accomplish different results. We are speaking of a difference in kind and not one of degree when we speak of these distinctions.

Thus, even though the question of a regulatory taking may require an analysis based upon the degree of interference, such an analysis is not necessary when an exercise of the power of eminent domain is in question. That this is so may be seen from an examination of certain conceptual distinctions between the respective powers. Thus:

1. The Government in exercising the power of eminent domain is a participant in an enterprise capacity in the process of competition among economic claims, producing benefit to the government enterprise, while in exercising the police power it is merely acting as mediator between private economic claims.[19]

2. The police power has for its object, conduct, and only indirectly affects interests in property, while eminent domain has for its object, interests in property and only indirectly affects conduct.[20]

3. The police power has for its purpose, regulation, while eminent domain has for its purpose, acquisition.[21]

4. The exercise of the police power involves, at least theoretically, no intent to take nor does it involve the assertion of a right to take, while intent to take

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19. See Sax, Takings and the Police Power, 74 Yale L.J. 36, 62 (1964).

20. See *Mugler v. Kansas*, 123 S.Ct. 623, 669 (1887).

21. See Stoebuck, p. 570.

and the assertion of the right are explicit in eminent domain.

5. As perhaps a corollary to Number 4, the expectation in the passage or implementation of a police power regulation is that no taking will occur, while in the passage of an enabling statute and in the filing of a complaint in condemnation the legitimate expectation is that a taking will result.

These distinctions, combined with the principles set forth above, clearly support a different analysis regarding the degree of "impact" which is required to support a finding of a taking in an eminent domain case.[22]

Thus, as a participant in the competition among economic claims, the Government has a vested interest in reducing the cost of its acquisitions to the minimum. It there-

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22. Such distinctions are not diminished by the fact that both powers are discussed in terms of the social contract expressed in Fifth Amendment taking and just compensation clause. Thus, that an exercise of the police power does, in fact, effect a taking does not automatically convert it to an exercise of the power of eminent domain; it merely means that the invasion or the interference has reached a level requiring compensation. The government could elect to discontinue the exercise, paying for the effects of the temporary interference; and if the interference is to continue, the compensation process is accomplished by the inverse condemnation procedure. In either event, however, the simple fact is that the government never sought to exercise its power of eminent domain, and would not be acquiring the property (if forced to acquire it) in the exercise of such power. Any acquisition would occur only as a result of an improper exercise of the regulatory power. Further, the fact that the taking clause would be brought to bear in relation to both the police power exercise and the power of eminent domain does *not* mean that they are not *sui generis*: the taking clause does not embody either power (they would exist absent the Fifth Amendment); it merely states the consequences of their exercise. The taking clause does not require that the respective powers be consistently treated and analyzed for all purposes. See *United States v. Clarke*, 445 U.S. 253 (1980).

fore has no reason not to defer payment well beyond the valuation date, to gamble on a "free ride" on the interest question. Thus while dates of takings and hence, dates of valuations, in police power cases are usually determined by ascertainable physical events (thereby preventing a free ride), no such event occurs in eminent domain cases, absent physical possession, to isolate the date for the value determination. An analysis is required which considers the vested interest of the Government and recognizes the need to pinpoint the valuation date in order to prevent a Governmental gamble on the interest question. These considerations are not present in police power cases.

Further, the expression of the intent to take—absent in police power cases—has its own deprivational effect and should therefore be present in the analysis.

As we have seen in the discussion under Point I, the intereference created by the filing of a complaint in condemnation is direct and takes from the owner all or nearly all of the benefits of ownership, leaving him with the detriments.[23] Viewing the assertion of the power of eminent domain by the Government as a special circumstance in the analysis of whether a taking has occurred, therefore, the necessity of finding the same kind or degree of interference as has been held to be a taking in police power cases disappears. Thus, where the power has been asserted, and the intent to take is clear, coupled with the rational expectation that a taking will occur, a taking may be

23. This is true whether or not the "negative restraint" analogy to a direct invasion is utilized. The filing of the complaint in and of itself is a direct invasion of the title.

found upon lesser evidence of interference in a condemnation case than in a police power case. This is so because the public assertion of the power is a direct, material burden on the legal relationship, and its presence in the analysis—based upon the emphasis to be given the deprivation of the owner—clearly lessens the need to resort to a full review of economic impact, interference with investment-backed expectations and the character of the interference.

Nor need the full impact of the Government interference have actually occurred. The final, full effect—that of divestiture—may only be prospective, but if the intent to accomplish it is clear, the assertion of the right, because it invades the property, i.e., the ownership interests, is a taking. See in this respect, *Kaiser Aetna v. United States, supra,* which held that the assertion of a navigational servitude by the Government *would result* in an actual physical invasion of the privately owned marina, i.e., that the decision in the case rested on a prospective effect which would constitute a taking. Thus the intent to accomplish the ultimate result, as evidenced by its assertion, has had decisive results in this Court. And *Kaiser Aetna* is more akin to a condemnation case than most non-condemnation situations because there the Government initiated the suit, asserting the applicability of its navigational servitude to prevent the exercise by Kaiser Aetna of its "right to exclude" ownership interest.

The result here is clear. The purpose of the condemnation was the preservation of the property *in statu quo.* This was accomplished by the filing of the complaint. Interest is due from the filing date.

III.

The Application Of 40 U.S.C. § 257 By The Government In This And Other Cases Allows Arbitrary, Inconsistent And Unjust Results Relating To The Correlation Of Valuation And Taking, Contrary To The Mandate Of The Fifth Amendment That Compensation Shall Be Just.

A question alternatively presented for decision by this case is this: may a uniform rule applicable to all straight condemnations under § 257 be fashioned to establish consistency in the determination of the date of taking?

Petitioner asserts that not only does the situation currently existing in Federal condemnations under § 257 amply demonstrate the need for a uniform rule, but that such a rule may be formulated consistently with existing principles and theories of Fifth Amendment construction.

The existing situation, to say the least, is a picture of confusion. The District Court in this case found the date of taking to be the date of the filing of the complaint, while the Court of Appeals found it to be the date of the deposit of the award. In another case involving the Big Thicket Preserve, the date of taking was found to be the date of the announcement of the award by the commissioners.[24] That case was not appealed. In the Ninth Circuit case which conflicts with the Fifth Circuit here, the Court of Appeals held that the date of taking was the date of the judgment,[25] contrary to the finding of the District Court that the date of taking was the date of the deposit of the award. In yet another case in

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24. *United States v. 59.29 Acres of Land*, 495 F. Supp. 212 (E.D. Tex. 1980).

25. *United States v. 156.81 Acres of Land, supra.*

the Ninth Circuit, involving the same project as the first case, the Court of Appeals held that the date of taking was the date of valuation,[26] apparently contrary to the District Court in that case, in view of the reversal and remand.[27]

This Court has adopted differing dates, in some cases based upon an acceptance of state procedures as being consistent with "just" compensation, see, e.g., *Brown v. United States*, 263 U.S. 78 (1923) (date of issuance of summons); and in others, *e.g., Danforth*, acceptance of a possession or payment of the compensation theory. See in this respect *Shoemaker v. United States*, 147 U.S. at 282 (1893), *Bauman v. Ross*, 167 U.S. 548 (1897) and *United States v. Rogers*, 255 U.S. 163 (1921).

Other cases dealing with the question are *United States v. Powelson*, 118 F.2d 79 (4th Cir. 1941), rev'd, o.g., 319 U.S. 266 (1943) (date of filing of the complaint); *United States v. Sargent*, 162 F. 81 (8th Cir. 1908) (date of the report of the commissioners); *Fibreboard Paper Products Corp. v. United States*, 355 F.2d 752 (9th Cir. 1966) (date of possession); *Morton Butler Timber Co. v. United States*, 91 F.2d 884 (6th Cir. 1937) (date of possession); *United States v. Certain Property, Borough of Manhattan*, 374 F.2d 138 (2d Cir. 1967) (date of possession); *23 Tracts of Land v. United States*, 177 F.2d 967 (6th Cir. 1949) (date of possession).[28]

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26. *United States v. 15.65 Acres of Land*, 689 F.2d 1329 (9th Cir. 1982).

27. No reported District Court discussion of the date of taking question has been found in that case.

28. Each of the latter cases which relies on actual possession appears to have relied, without analysis, upon cases such as *Danforth* and *Rogers*, which merely accepted the "taking means possession or accrual of title" concept, also without analysis.

The result of the existing confusion is not just that one landowner in the Ninth Circuit may be treated differently from a landowner in the Fifth Circuit. It also means that "just compensation" in cases where the Government has not entered into actual possession may depend upon the whim of Government in the selection of the means to effect its acquisition. Thus, the interest of one landowner, by the Government's choice to proceed under 40 U.S.C. § 258a,[29] may receive immediate compensation, will have the benefit of a definite date of taking, and will be entitled to interest on any difference between the deposited estimate of value and the actual award determined later. On the other hand, his neighbor, by the Government's selection of § 257 as the mode of proceeding, will not receive any money at the outset, will have the date of taking remain undetermined, perhaps for years, will suffer the likelihood of a great time disparity between date of valuation and date of taking, will receive no interest at all in the event the date of taking is determined to be the date of payment of the award, and suffers the vagaries of value fluctuations in the interval (not to mention the potential deterioration of any improvements which may exist). Both landowners were effectively denied the benefits of ownership from the date the Government began its proceedings—but one will receive just compensation (at least in theory) while the justness of compensation to his neighbor is highly problematical. Where the Government does not enter into possession, thus, just compensation in side by side cases is allowed by § 257 to be materially affected by artificial choices made by the Government.

Clearly, neither Congress nor the Executive has the right or the power to prejudice the rights of the landowner by the selection of the manner in which the Gov-

29. See Appendix A.

ernment elects to proceed to condemn private property. The determination of just compensation is a judicial function and cannot be taken away by statute or executive fiat, *Seaboard Airline Railway Co. v. United States, supra,* at p. 304; *Monongahela Navigation Co. v. United States,* 148 U.S. 312, (1893), and should not be impaired by artificial, arbitrary government choices.[30]

Perhaps the greatest vice of § 257, however, is the distortion and confusion which it allows by the failure to fix a secure date of taking. The problem inherent in straight condemnations is that the date of payment *always* follows the date of valuation. The problem occurs if the date of payment is determined to be the date of taking, as the Court of Appeals has decided here. In that event, the date of taking will *always* be subsequent to the date of valuation. This situation manifestly violates the basic constitutional premise that the owner is entitled to receive compensation based upon the value of his property *at the date of taking.* This basic proposition is so well established, see *United States v. Miller,* 317 U.S. 369 (1943); *United States v. Klamath and Moadoc Tribes,* 304 U.S. 119 (1938); *Jacobs v. United States,* 290 U.S. 13 (1933); *United States v. Rogers,* 255 U.S. 163 (1921); *Monongahela Navigation Co. v. United States,* 148 U.S. 312 (1893), that it stands as universally accepted without the necessity of further elaboration.

This vice is not cured by the allowance of interest from the date of taking, for—as here—when the date of payment is held to be the date of taking, no interest is due. To require a retrial of value questions as of a later date —in effect a new trial in every respect—is not only waste-

30. The essential purpose of the clause was to "prevent arbitrary government action", Sax, *Takings and the Police Power,* 74 Yale L.J. 36, at p. 58 (1964).

ful of the resources of all concerned, but also imposes potential prejudices—created by the arbitrary choice of the Government—which the landowner ought not to bear. The vice can be cured by the establishment of a uniform rule placing the date of taking at a time which is consistent with constitutional requirements.

The determination of the correct rule applies the same Fifth Amendment principles discussed above, that values are determined as of the date of taking, that it is the deprivation of the owner and not the accrual of a right or interest to the sovereign by which the determination of whether a taking has occurred is measured, and that it is the legal relationship concept of property, rather than the *res*, which is utilized in Fifth Amendment analysis.

The application of such principles, as we have seen under Points I and II, requires the discarding of the passage of title test in eminent domain cases.

But for yet another reason the taking concept represented by the passage of title (as established by the date of the payment of the award) must be discarded: it is a totally arbitrary event, having no relation whatsoever to the true test of a taking, the deprivation of the interest of the owner. Once it has been firmly decided that the existence, or not, of an accrual of title in the sovereign and the existence, or not, of possession by the sovereign are not conclusive in the taking analysis (except, in the latter case, where possession might occur *before* the filing of condemnation proceedings), the payment of the award becomes irrelevant except as it determines the date on which the accrual of interest on the award ends.

We have demonstrated under Point I that under current taking analysis a taking occurred here in actuality and that the interference was analogous to a direct invasion

under Michelmanian analysis; and in Point II, we further demonstrated that the particular purpose of the condemnation was a highly relevant factor in either of the taking analyses discussed under such points, i.e. that the preservation of a wilderness was the purpose of the condemnation and was accomplished by the interference against the ownership interests which resulted from the filing of the complaint. At the heart of the taking theory here suggested, however, is the assumption that the *purpose* of the particular condemnation is irrelevant, i.e. that *all* condemnations interfere with constitutionally-protected ownership interests to a sufficient degree to constitute a taking.

Thus, whether the filing of the complaint is deemed to be the equivalent of a direct invasion, or whether it is viewed as so strong a circumstance that it is a sufficient interference even if not analogous to a direct invasion, the filing of the complaint is the focal point of the governmental interference, alowing the rule to be stated as follows:

> Because in a straight condemnation (absent prior possessory acts) the filing of the complaint in condemnation is an assertion of a right and intent to take, the effect of which in every case is to impose a direct, material and adverse interference with the ownership interests in the property, and which according to legitimate expectation will result in a divestiture of title for a public use, the date of taking for the purpose of determining just compensation is the date of the filing of the complaint.[31]

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31. It should be clear that we are not suggesting that a uniform rule may be made applicable to police power cases. The rule here suggested for condemnation cases will have no effect on the exercise of other powers. There is no analogy available in a police power case to the filing of a complaint in condemnation, unless it would be to a direct invasion, which is a taking in any event.

The proposed rule is consistent with the basic principles discussed above and with the results of the cases announcing them. Thus, it establishes a date of taking which will be prior to a valuation hearing, allowing valuation testimony as of the date of taking as required by *United States v. Miller, supra,* and the other numerous authorities stating such principle. It requires the accrual of interest from the date of taking on the award ultimately determined, as is proper to constitute just compensation, as held by *United States v. Rogers, supra,* and *Seaboard Air Line Ry. Co. v. United States, supra.* It does not prevent the Government from discontinuing the action if it determines that the award is beyond its purse as suggested in *Danforth;* the rule merely requires that interest (or other damages) be paid during the period of the pendency of the proceedings as a temporary taking, in line with *Dow v. United States, supra.*[32]

Further, the rule is not inconsistent with those cases which hold that the continuation of benefits to the landowner during the pendency of condemnation prevents the finding of a taking prior to physical possession or accrual of title. *See, Shoemaker v. United States, supra.* The rule here suggested may be applied to both improved and unimproved property with equal facility. Regarding improved property, meaning property productive of income, the Government, first, has a choice: it can either take possession and assume the benefits of the property, or it can leave the benefits to the owner during the pendency of the suit. In the latter event the benefits which the landowner would continue to receive would merely be offset against the interest accruing during the pendency

32. See, in addition, the dissent of Justice Brennan in *San Diego Gas & Electric Co. v. City of San Diego,* 450 U.S. 621, 658-659 (1981).

of the action. On the other hand, if the Government has deposited an estimated award, thereby preventing the accrual of interest (except on the difference, if any, between the deposit and the ultimate award), then the concept of fairness is served by allowing the owner to retain the benefits (except to the extent of any offset against interest on the difference between the deposit and the award), because the Government, having had the opportunity to appropriate the benefits to itself, should not be heard to complain that the landowner has benefitted from the Government's failure to exercise its rights.

Finally, the suggested rule should be examined in connection with 40 U.S.C. § 258a and Rule 71A, Fed. R. Civ. P.[33]

Section 258a, the Declaration of Taking Act, requires the filing of a declaration of taking and the deposit of an estimated award, at which time the title sought ". . . shall vest in the United States of America, and said lands shall be deemed to be condemned and taken for the use of the United States, . . ." Interest is required to be paid on the difference between the amount of the initial deposit and the final award. As is evident, the rule suggested above to be applicable to § 257 promotes the utilization of the same type of procedure as is found under § 258a. The suggested rule, however, does not abrogate § 257. The Government still has a choice between the different methods of condemnation: if under § 258a it must deposit the funds, while under § 257 it may defer the intial deposit, or not deposit any compensation at all until after the determination of the final award. What the rule does, however, is announce to the Government that the system which § 257 allows does not pass constitutional muster.

33. See Appendices A and B hereto, following page 50.

insofar as it leaves the determination of the date of taking open to be influenced by artificial and arbitrary events or determinations. § 258a is not subject to that vice.

Rule 71A is the successor to the Conformity Act (former 40 U.S.C. § 258), and sets forth the procedures governing condemnation proceedings in the Federal Courts. It was intended to provide a uniformity of procedure under those acts of Congress which authorized condemnations but did not specify the procedure to be followed or allowed conformity with state procedures.[34] The Rule, however, does not purport to have any effect on the determination of a date of taking and does not require that compensation is to be deposited at any particular time, providing only, in subdivision (j) that "[the] plaintiff shall deposit with the Court any money required by law as a condition to the exercise of the power of eminent domain; and, although not so required, may make a deposit when permitted by statute . . ."

There is overlap, however, when considering the dismissal question. Taking subparagraph (1) and (3) together, Rule 71A allows dismissal as of right at any time prior to the hearing to determine the award, (if no possession or title has been obtained), but after that point in time dismissal is subject to court control.

The question is whether the suggested rule is consistent with the dismissal rights set forth in Rule 71A. Plainly, no inconsistency exists. Thus, assuming the government has not taken possession, it may dismiss as of right if it has not "acquired the title or a lesser interest." No title is "acquired" under the taking theory posed here—it is merely the effect on title which is the taking. If the Government dismisses prior to the value hearing and has

34. See Original Report of Advisory Committee on Rules, Par. 2.

not taken possession, under the rule here suggested the Government would be liable for the "damages" caused by the interference resulting from the pendency of the action, which might be recovered by any of several measures, whether by interest (upon a showing of value) or rental value or other compensatory measure. If possession is assumed, dismissal may not occur as a matter of right, in any event, and the Court is required to award compensation for the possession. If after the hearing on value the Government elects to dismiss, it must pay compensation for any possession and, under the rule here suggested, may be required to pay interest on the amount of the award (assuming no prior deposit). No title or lesser interest is "taken" under the rule suggested here. Thus the suggested rule and Rule 71A would operate together without conflict.

CONCLUSION

It is manifest, from the foregoing argument, that Kirby suffered a taking of its property long before the payment of the award. Irrespective of which road to decision is adopted by this Court, whether (1) the application of existing taking analysis to the circumstances of this case, (2) the application of a separate eminent domain taking analysis to the circumstances of this case or (3) the announcement of a general rule applicable to all straight condemnations, the result is the same. Kirby is entitled to interest from the date of the filing of the complaint (or, in the event the stipulation is enforced, from the date of the hearing before the commissioners).

Upon remand, based upon a holding that the date of taking preceded the payment of the award, the District Court should be instructed to apply a market interest rate from the date of taking determined by this Court.

In the event the decision of the Fifth Circuit is affirmed, the instructions upon remand should require the District Court, either itself or by reference to the Commission, to hold additional hearings for the purpose of determining increased value through the date of taking. It is hoped that this wasteful "double trial" will not be ordered by the Court.

Respectfully submitted,

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APPENDIX A

§ 258a. *Same; lands, easements, or rights-of-way for public use; taking of possession and title in advance of final judgment; authority; procedure*

In any proceeding in any court of the United States outside of the District of Columbia which has been or may be instituted by and in the name of and under the authority of the United States for the acquisition of any land or easement or right of way in land for the public use, the petitioner may file in the cause, with the petition or at any time before judgment, a declaration of taking signed by the authority empowered by law to acquire the lands described in the petition, declaring that said lands are thereby taken for the use of the United States. Said declaration of taking shall contain or have annexed thereto—

(1) A statement of the authority under which and the public use for which said lands are taken.

(2) A description of the lands taken sufficient for the identification thereof.

(3) A statement of the estate or interest in said lands taken for said public use.

(4) A plan showing the lands taken.

(5) A statement of the sum of money estimated by said acquiring authority to be just compensation for the land taken.

Upon the filing said declaration of taking and of the deposit in the court, to the use of the persons entitled thereto, of the amount of the estimated compensation stated in said declaration, title to the said lands in fee simple absolute, or such less estate or interest therein as is

specified in said declaration, shall vest in the United States of America, and said lands shall be deemed to be condemned and taken for the use of the United States, and the right to just compensation for the same shall vest in the persons entitled thereto; and said compensation shall be ascertained and awarded in said proceeding and established by judgment therein, and the said judgment shall include, as part of the just compensation awarded, interest at the rate of 6 per centum per annum on the amount finally awarded as the value of the property as of the date of taking, from said date to the date of payment; but interest shall not be allowed on so much thereof as shall have been paid into the court. No sum so paid into the court shall be charged with commissions or poundage.

Upon the application of the parties in interest, the court may order that the money deposited in the court, or any part thereof, be paid forthwith for or on account of the just compensation to be awarded in said proceeding. If the compensation finally awarded in respect of said lands, or any parcel thereof, shall exceed the amount of the money so received by any person entitled, the court shall enter judgment against the United States for the amount of the deficiency.

Upon the filing of a declaration of taking, the court shall have power to fix the time within which and the terms upon which the parties in possession shall be required to surrender possession to the petitioner. The court shall have power to make such orders in respect of encumbrances, liens, rents, taxes, assessments, insurance, and other charges, if any, as shall be just and equitable.

Feb. 26, 1931, c. 307, § 1, 46 Stat. 1421.

APPENDIX B

Rule 71A. *Condemnation of Property*

(a) *Applicability of other rules*

The Rules of Civil Procedure for the United States District Courts govern the procedure for the condemnation of real and personal property under the power of eminent domain, except as otherwise provided in this rule.

(b) *Joinder of properties*

The plaintiff may join in the same action one or more separate pieces of property, whether in the same or different ownership and whether or not sought for the same use.

(c) *Complaint*

(1) *Caption.* The complaint shall contain a caption as provided in Rule 10(a), except that the plaintiff shall name as defendants the property, designated generally by kind, quantity, and location, and at least one of the owners of some part of or interest in the property.

(2) *Contents.* The complaint shall contain a short and plain statement of the authority for the taking, the use for which the property is to be taken, a description of the property sufficient for its identification, the interests to be acquired, and as to each separate piece of property a designation of the defendants who have been joined as owners thereof or of some interest therein. Upon the commencement of the action, the plaintiff need join as defendants only the persons having or claiming an interest in the property whose names are then known, but prior to any hearing involving the compensation to be paid for a piece of property, the plaintiff shall add as defendants all per-

sons having or claiming an interest in that property whose names can be ascertained by a reasonably diligent search of the records, considering the character and value of the property involved and the interests to be acquired, and also those whose names have otherwise been learned. All others may be made defendants under the designation "Unknown Owners." Process shall be served as provided in subdivision (d) of this rule upon all defendants, whether named as defendants at the time of the commencement of the action or subsequently added, and a defendant may answer as provided in subdivision (e) of this rule. The court meanwhile may order such distribution of a deposit as the facts warrant.

(3) *Filing.* In addition to filing the complaint with the court, the plaintiff shall furnish to the clerk at least one copy thereof for the use of the defendants and additional copies at the request of the clerk or of a defendant.

(d) *Process*

(1) *Notice; delivery.* Upon the filing of the complaint the plaintiff shall forthwith deliver to the clerk joint or several notices directed to the defendants named or designated in the complaint. Additional notices directed to defendants subsequently added shall be so delivered. The delivery of the notice and its service have the same effect as the delivery and service of the summons under Rule 4.

(2) *Same; form.* Each notice shall state the court, the title of the action, the name of the defendant to whom it is directed, that the action is to condemn property, a description of his property sufficient for its identification, the interest to be taken, the authority for the taking, the uses for which the property is to be taken, that the defend-

ant may serve upon the plaintiff's attorney an answer within 20 days after service of the notice, and that the failure so to serve an answer constitutes a consent to the taking and to the authority of the court to proceed to hear the action and to fix the compensation. The notice shall conclude with the name of the plaintiff's attorney and an address within the district in which action is brought where he may be served. The notice need contain a description of no other property than that to be taken from the defendants to whom it is directed.

(3) *Service of notice*

(i) *Personal service.* Personal service of the notice (but without copies of the complaint) shall be made in accordance with Rule 4(c) and (d) upon a defendant who resides within the United States or its territories or insular possessions and whose residence is known.

(ii) *Service by publication.* Upon the filing of a certificate of the plaintiff's attorney stating that he believes a defendant cannot be personally served, because after diligent inquiry within the state in which the complaint is filed his place of residence cannot be ascertained by the plaintiff or, if ascertained, that it is beyond the territorial limits of personal service as provided in this rule, service of the notice shall be made on this defendant by publication in a newspaper published in the county where the property is located, or if there is no such newspaper, then in a newspaper having a general circulation where the property is located, once a week for not less than three successive weeks. Prior to the last publication, a copy of the notice shall also be mailed to a defendant who cannot be personally served as provided in this rule but whose place of residence is then known. Unknown owners may be

served by publication in like manner by a notice addressed to "Unknown Owners."

Service by publication is complete upon the date of the last publication. Proof of publication and mailing shall be made by certificate of the plaintiff's attorney, to which shall be attached a printed copy of the published notice with the name and dates of the newspaper marked thereon.

(4) *Return; amendment.* Proof of service of the notice shall be made and amendment of the notice or proof of its service allowed in the manner provided for the return and amendment of the summons under Rule 4(g) and (h).

(e) *Appearance or answer*

If a defendant has no objection or defense to the taking of his property, he may serve a notice of appearance designating the property in which he claims to be interested. Thereafter he shall receive notice of all proceedings affecting it. If a defendant has any objection or defense to the taking of his property, he shall serve his answer within 20 days after the service of notice upon him. The answer shall identify the property in which he claims to have an interest, state the nature and extent of the interest claimed, and state all his objections and defenses to the taking of his property. A defendant waives all defenses and objections not so presented, but at the trial of the issue of just compensation, whether or not he has previously appeared or answered, he may present evidence as to the amount of the compensation to be paid for his property, and he may share in the distribution of the award. No other pleading or motion asserting any additional defense or objection shall be allowed.

(f) *Amendment of pleadings*

Without leave of court, the plaintiff may amend the complaint at any time before the trial of the issue of compensation and as many times as desired, but no amendment shall be made which will result in a dismissal forbidden by subdivision (i) of this rule. The plaintiff need not serve a copy of an amendment, but shall serve notice of the filing, as provided in Rule 5(b), upon any party affected thereby who has appeared and, in the manner provided in subdivision (d) of this rule, upon any party affected thereby who has not appeared. The plaintiff shall furnish to the clerk of the court for the use of the defendants at least one copy of each amendment, and he shall furnish additional copies on the request of the clerk or of a defendant. Within the time allowed by subdivision (e) of this rule a defendant may serve his answer to the amended pleading, in the form and manner and with the same effect as there provided.

(g) *Substitution of parties*

If a defendant dies or becomes incompetent or transfers his interest after his joinder, the court may order substitution of the proper party upon motion and notice of hearing. If the motion and notice of hearing are to be served upon a person not already a party, service shall be made as provided in subdivision (d)(3) of this rule.

(h) *Trial*

If the action involves the exercise of the power of eminent domain under the law of the United States, any tribunal specially constituted by an Act of Congress governing the case for the trial of the issue of just compensation shall be the tribunal for the determination of

that issue; but if there is no such specially constituted tribunal any party may have a trial by jury of the issue of just compensation by filing a demand therefor within the time allowed for answer or within such further time as the court may fix, unless the court in its discretion orders that, because of the character, location, or quantity of the property to be condemned, or for other reasons in the interest of justice, the issue of compensation shall be determined by a commission of three persons appointed by it. If a commission is appointed it shall have the powers of a master provided in subdivision (c) of Rule 53 and proceedings before it shall be governed by the provisions of paragraphs (1) and (2) of subdivision (d) of Rule 53. Its action and report shall be determined by a majority and its findings and report shall have the effect, and be dealt with by the court in accordance with the practice, prescribed in paragraph (2) of subdivision (e) of Rule 53. Trial of all issues shall otherwise be by the court.

(i) *Dismissal of action*

(1) *As of right.* If no hearing has begun to determine the compensation to be paid for a piece of property and the plaintiff has not acquired the title or a lesser interest in or taken possession, the plaintiff may dismiss the action as to that property, without an order of the court, by filing a notice of dismissal setting forth a brief description of the property as to which the action is dismissed.

(2) *By stipulation.* Before the entry of any judgment vesting the plaintiff with title or a lesser interest in or possession of property, the action may be dismissed in whole or in part, without an order of the court, as to any property by filing a stipulation of dismissal by the plaintiff

and the defendant affected thereby; and, if the parties so stipulate, the court may vacate any judgment that has been entered.

(3) *By order of the court.* At any time before compensation for a piece of property has been determined and paid and after motion and hearing, the court may dismiss the action as to that property, except that it shall not dismiss the action as to any part of the property of which the plaintiff has taken possession or in which the plaintiff has taken title or a lesser interest, but shall award just compensation for the possession, title or lesser interest so taken. The court at any time may drop a defendant unnecessarily or improperly joined.

(4) *Effect.* Except as otherwise provided in the notice, or stipulation of dismissal, or order of the court, any dismissal is without prejudice.

(j) *Deposit and its distribution*

The plaintiff shall deposit with the court any money required by law as a condition to the exercise of the power of eminent domain; and, although not so required, may make a deposit when permitted by statute. In such cases the court and attorneys shall expedite the proceedings for the distribution of the money so deposited and for the ascertainment and payment of just compensation. If the compensation finally awarded to any defendant exceeds the amount which has been paid to him on distribution of the deposit, the court shall enter judgment against the plaintiff and in favor of that defendant for the deficiency. If the compensation finally awarded to any defendant is less than the amount which has been paid to him, the court shall enter judgment against him and in favor of the plaintiff for the overpayment.

(k) *Condemnation under a State's power of eminent domain*

The practice as herein prescribed governs in actions involving the exercise of the power of eminent domain under the law of a state, provided that if the state law makes provision for trial of any issue by jury, or for trial of the issue of compensation by jury or commission or both, that provision shall be followed.

(l) *Costs*

Costs are not subject to Rule 54(d).

(Added Apr. 30, 1951, eff. Aug. 1, 1951, and amended Jan. 21, 1963, eff. July 1, 1963).

APPENDIX C

United States of America,
Plaintiff,

v.

Certain Lands in Eastham, Truro and Wellfleet,
County of Barnstable, Commonwealth of
Massachusetts, et al,
Defendants.

ORDER

May 28, 1982

CAFFREY, Ch. J.

In each of the above-captioned tracts the issue of ownership of the tract has been resolved by the Court and the valuation of each individual tract has been determined by a trial before the three Commissioners appointed by this Court to value tracts taken by the government for the Cape Cod national Seashore. Subsequent to the filing of the findings of the Commissioner, the United States, for circumstances obviously beyond the control of the United States Attorney for the district or the Assistant United States Attorneys who have been representing the United States in this litigation, has failed to pay the landowners the amount determined by the Commissioners to constitute just compensation for the taking.

The owners of the land taken have now filed motions for the payment of interest on the condemnation awards made for each of the above-referenced tracts. The motion has been opposed by the government and has been briefed and argued by the parties.

It requires no great legal scholarship for a person to realize that the government's power to take private property by eminent domain is subject to the Fifth Amendment to the Constitution of the United States which in turn requires that there be no taking of property by the sovereign without due process of law. It likewise requires no scholarship to understand that due process of law carries with it the obligation on the sovereign to make payment to the private citizen within a reasonable time after the taking by eminent domain.

In the instant case, the conduct of the Department of Interior in connection with the establishment of the Cape Cod National Seashore has been a classic example of the denial of due process to those persons whose land has been taken. The land has effectively been tied up for Federal Government purposes since Congress in 1961 enacted Public Law 87-126, Sec. 4(d), codified at 16 U.S.C. § 4596-3(d). That statute created the Cape Cod National Seashore, and shortly thereafter *lis pendens* were filed in the Barnstable Registry of Deeds concerning most of the tracts involved. Since that time the landowners have been unable to sell their land or do much of anything with it other than pay municipal taxes thereon.

The Supreme Court of the United States in a number of decisions has ruled that the Fifth Amendment requires the payment of interest to landowners whose land is taken but not promptly compensated for. *See Seaboard Air Line Railway Co. v. United States*, 261 U.S. 299 (1923) and *United States v. Rogers*, 255 U.S. 163 (1921). The validity of those decisions, both filed in the 1920's, has been reaffirmed by the Supreme Court in *United States v. Klamath Indians*, 304 U.S. 119 (1938) and such cases as *Albrecht v. United States*, 329 U.S. 599 (1946).

The validity of the ruling that the government has an obligation to pay interest to the landowner when the government has been tardy in making prompt payment for the taking of private property has been recognized in *United States v. 106.64 Acres of Land*, 264 F.Supp. 199 (D. Neb. 1967) and more recently in *United States v. 59.29 Acres of Land*, 495 F.Supp. 212 (E.D. Texas 1980).

Accordingly, I rule that the due process clause of the Fifth Amendment requires that the United States pay interest at the rate of 8% to each of the owners of the above-listed tracts from the date of the filing of the Commissioners' report for that particular tract to the date of payment of the judgment in that amount.

Andrew A. Caffrey, Ch. J.